FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
July 26, 2006
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE CRESTVIEW FUNERAL HOME, INC., doing business as Crestview Florist, Debtor.	BAP No. NM-05-059
JOHN LESTER SALAZAR, Plaintiff – Appellant, v. JAMES A. MCCORMICK, Trustee, Defendant – Appellee.	Bankr. No. 7-95-11923-MA Adv. No. 00-1248-M0 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before CORNISH, NUGENT, and THURMAN, Bankruptcy Judges.

THURMAN, Bankruptcy Judge.

Appellant John Salazar (Salazar) appeals the bankruptcy court's denial of his motion to reconsider its previous denial of his motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(1), (2), and (3).[1] We affirm.

I. Background

Salazar is the former president of debtor, Crestview Funeral Home

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] This provision is made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 9024.

(Crestview), which filed a petition for Chapter 11 relief in July, 1995. Appellee McCormick, Crestview's trustee in bankruptcy (Trustee), operated Crestview until January, 1998, when it ceased operations. At the Trustee's request, the bankruptcy court converted the bankruptcy proceeding to a Chapter 7 liquidation shortly thereafter. During the pendency of the bankruptcy case, Salazar was convicted in state court of fraud and forgery relating to his operation of Crestview and its handling of prepaid ("pre-need") funeral accounts. He was incarcerated in New Mexico correctional facilities until November, 2004.

Salazar makes a number of allegations against Trustee, all of which relate to Trustee's post-petition handling of Crestview's affairs. These allegations have been the subject of many prior legal proceedings, beginning with the filing of adversary proceeding number 00-1091 in the bankruptcy case in May, 2000 ("AP 1091"). In AP 1091, Salazar alleged that Trustee had committed fraud and breached fiduciary duties in managing Crestview's estate. Before AP 1091 could be resolved, Salazar filed a complaint against Trustee and Trustee's attorney in the U.S. District Court for the District of New Mexico ("district court action"), alleging various torts arising from Trustee's operation of Crestview. All of Salazar's claims against Trustee's attorney, along with his libel, slander, and defamation claims against Trustee, were dismissed with prejudice in the district court action. The remainder of Salazar's claims in the district court action were referred to the bankruptcy court, where they became adversary proceeding number 00-1248 ("AP 1248"). Meanwhile, Salazar pursued the defamation claims in the New Mexico state courts, ultimately losing in both the trial and appellate courts.

A six-day trial was concluded in AP 1091 in September, 2002, after which the bankruptcy court denied the relief requested by Salazar and specifically found no mismanagement or misconduct by Trustee in his dealings with Crestview. Salazar's appeal of that judgment was subsequently affirmed in *Salazar v.*

McCormick (In re Crestview Funeral Home).[2] Thereafter, Trustee moved for summary judgment in AP 1248, asserting that Salazar's claims in that case had been decided in AP 1091 and were therefore precluded by the doctrine of *res judicata*. Salazar responded to the summary judgment motion, in part, by alleging that he could not adequately address the issues until he had been given an opportunity to review all of Crestview's business and bankruptcy records.

Due to Salazar's incarceration, production of the requested documents was somewhat burdensome and atypical. However, in approximately December, 2003, sixty-two boxes of Crestview records were delivered to Salazar in prison. Salazar briefly reviewed these documents with an attorney, Benjamin Chavez, and indicated which documents he wanted copied. On February 23, 2004, the bankruptcy court held a hearing in AP 1248 on a fee application filed by Trustee's counsel. Salazar "attended" this hearing, and one the next day, by telephone. At the fee hearing, Chavez, who is an attorney but did not represent Salazar in the bankruptcy proceedings, assured the bankruptcy court that he would have copies of the requested documents made and delivered to Salazar within a week. At the next day's hearing, in the course of discussing the documents, the bankruptcy judge made the following statement to Salazar:

> My inclination is not to worry about setting the pending adversary for trial until you have everything you think you need.
>
> . . . .
>
> We will probably just set a status conference in another four months or six months and then find out where you are. If you get the stuff you are asking for, and that gets resolved, you might give Mr. Wilson [a court employee] a heads-up and then we will set something sooner and figure out where we are and go from there.[3]

Shortly after these hearings, the copied documents were delivered to

---

[2] 294 B.R. 198 (Table), 2003 WL 21383005 (10th Cir. BAP 2003).

[3] *Transcript of Feb. 24, 2004, Hearing* at 30, *in* Appellant's Appendix, Vol. II at 316.

Salazar in prison.[4] Approximately five months later, the bankruptcy court issued an "Order on Deadlines Regarding Motion for Summary Judgment" that, while first noting that Salazar had been given an opportunity to conduct further discovery, directed him to file any additional response to the motion for summary judgment by August 4, 2004. Salazar did file a supplemental response to the summary judgment motion, in which he stated that ". . . [Salazar] now has been able to review the 62 boxes [of Crestview's records] through the aid of Ben Chavez."[5] However, noting that he had not yet received 52 documents that he apparently had requested from the Department of Justice, Salazar declared himself unable to oppose the motion and requested further discovery. Salazar also asserted that the bankruptcy judge had "held that he would wait for discovery from the U.S. Department of Justice or order from the District Court before proceeding with [AP 1248]."[6] On November 19, 2004, the bankruptcy court entered summary judgment in favor of Trustee on the ground that all of Salazar's claims were barred because they already had been litigated in AP 1091. In so ruling, the bankruptcy court first noted that Salazar's motion to compel the Department of Justice to produce the documents had been previously denied, and that the documents sought were not relevant to the issue of claim preclusion. Salazar did not appeal this judgment, and it is final and now non-appealable.

Some three months later, on February 16, 2005, Salazar filed a motion for relief from the judgment in AP 1248, pursuant to Fed. R. Civ. P. 60(b). In this

---

[4] Salazar's alleged inability to adequately review Crestview's records, both originals and copies, while incarcerated provides the basis for his Rule 60(b) claim in AP 1248. However, the issue of adequate access was not raised in response to the summary judgment motion, and relates to the conduct of prison officials, rather than to Trustee.

[5] *Supplement to Plaintiff's Response to Motion for Summary Judgment* at 1, *in* Appellee's Appendix at 195.

[6] *Id.* at 2, in Appellee's Appendix at 227.

motion, Salazar contends that the Crestview documents show that there was insurance coverage for missing pre-need funds that the Trustee had failed to obtain, and that Crestview employees other than himself were responsible for those losses. In this motion, Salazar asserted, for the first time, that he was wrongfully denied access to documents by prison officials during his incarceration. Salazar's Rule 60(b) motion was denied by the bankruptcy court on May 24, 2005, and, on June 2, 2005, Salazar filed a motion for reconsideration. The reconsideration motion was denied by the bankruptcy court on June 8, 2005, and Salazar filed a notice of appeal on June 16, 2005.

II. Appellate Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[7] Neither party elected to have this appeal heard by the United States District Court for the District of New Mexico, thus consenting to review by this Court.

A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[8] The bankruptcy court's order denying Rule 60(b) relief was a final order for the purposes of § 158(a)(1). However, Salazar's time for filing a notice of appeal from that order was tolled by the filing of his post-judgment motion.[9] Salazar's notice of appeal was timely filed within ten days of the bankruptcy court's denial of his post-judgment motion for reconsideration, and this court has appellate jurisdiction to

---

[7] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

[8] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (citation omitted).

[9] Fed. R. Bankr. P. 8002(b).

review his claims.[10]

III. Motion to Supplement

Subsequent to oral argument in this case, Trustee filed a "Motion to Supplement the Record," to which Salazar did not respond. The motion seeks to add to the appellate record the bankruptcy court's "Order on Motion for Permission to Act in Lieu of Trustee," dated October 26, 2005, and entered in the main bankruptcy case ("Insurance Order"). The Insurance Order, which was entered after briefing in this appeal was complete, directs Salazar to present the insurance policies that he contends cover pre-need losses, along with proposed letters to the insurance companies demanding coverage, to the Trustee's attorney. The Insurance Order gave Salazar 120 days, or until February 23, 2006, to present the insurance policies and demand letters, which Salazar failed to do.

These subsequent events in the bankruptcy case are clearly relevant to the issues herein, particularly to Salazar's Rule 60(b)(2) claim that he has newly discovered evidence regarding insurance coverage. We therefore grant Trustee's motion and supplement the appellate record with the Insurance Order.

IV. Standard of Review

For purposes of standard of review, trial court decisions are traditionally divided into three categories: questions of law, questions of fact, and matters of discretion.[11] Decisions on Rule 60(b) motions are reviewed under an abuse of discretion standard.[12] Rule 60(b) relief is intended only to be granted in

---

[10] Significantly, the bankruptcy court's November, 2004, order granting summary judgment in favor of Trustee was also a final order, which Salazar did not appeal. Therefore, this Court's appellate jurisdiction is limited to review of the decision to deny Salazar relief under Rule 60(b) and does not include consideration of the merits of the prior summary judgment.

[11] *Fowler Bros. v. Young (In re Young),* 91 F.3d 1367, 1370 (10th Cir. 1996).

[12] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994).

exceptional circumstances,[13] and the trial court has substantial discretion in ruling on such motions.[14] Under the abuse of discretion standard, "a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances."[15]

V. Discussion

The provisions of Rule 60(b) upon which Salazar relies are as follows:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); [or] (3) fraud . . . misrepresentation, or other misconduct of an adverse party . . . .

As Salazar asserts the applicability of a number of Rule 60(b)'s prongs, we review each separately.

A. 60(b)(1) - Mistake and excusable neglect

Salazar claims to have been confused by the bankruptcy judge's comments at the February 24, 2004, hearing in AP 1248, which he understood to mean that he would be allowed another opportunity to review documents. Salazar contends that his confusion constitutes "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b)(1). The bankruptcy court's comments were that there would probably be a status conference after Salazar had all the documents he needed and before a trial date would be set. Salazar claims that he was waiting until the status conference to inform the court that he had been unable to complete a review of all documents produced to him. Instead, the court entered a scheduling order directing the parties to file supplemental briefs regarding the

---

[13] *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576-77 (10th Cir. 1996).

[14] *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1145 (10th Cir. 1990).

[15] *Moothart*, 21 F.3d at 1504 (citation omitted).

previously filed summary judgment motion. Although Salazar filed a supplemental response claiming to have reviewed all of the documents he requested from Crestview, his Rule 60(b) motion alleged that he actually did not have adequate time or opportunity to thoroughly review those documents.

> "[A]s a general proposition, the 'mistake' provision in Rule 60(b)(1) provides for the reconsideration of judgments only where: (1) a party has made an excusable litigation mistake or an attorney in the litigation has acted without authority from a party, or (2) where the judge has made a substantive mistake of law or fact in the final judgment or order."[16]

Salazar argues that his failure to raise the document access issue was, essentially, an "excusable litigation mistake." However, litigation mistakes remediable by Rule 60(b)(1) are limited to mistakes that a party could not have protected against.[17]

Salazar's failure to inform the court that he had been denied adequate access to the documents was within his control and could have been protected against. Although it may be true that Salazar, who was acting *pro se*, misunderstood the court's intentions regarding further proceedings, it is difficult to imagine how the court's comments could have caused him to state in his supplemental brief that he had reviewed the Crestview documents if he had not.[18] A party who simply misunderstands or fails to predict the legal consequences of his deliberate acts cannot use Rule 60(b)(1) to undo those mistakes.[19] Similarly, carelessness by a litigant is insufficient to invoke Rule 60(b)(1) relief.[20] The

---

16 *Cashner*, 98 F.3d at 576.

17 *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999).

18 Although Salazar's request for additional time to review Department of Justice documents was denied, none of his subsequent Rule 60(b) claims was premised upon those documents.

19 *Yapp*, 186 F.3d at 1231.

20 *Pelican Prod. Corp.*, 893 F.2d at 1146.

bankruptcy court's decision was well within the bounds of permissible choice in these circumstances.

B. 60(b)(2) - Newly discovered evidence

In order to prevail on a Rule 60(b)(2) "newly discovered evidence" claim, Salazar must satisfy five conditions: 1) the evidence was newly discovered since the bankruptcy court's ruling on summary judgment, 2) Salazar was diligent in discovering the new evidence, 3) the evidence is not merely cumulative or impeaching, 4) the evidence is material, and 5) the evidence would probably produce a different result.[21] Salazar's "newly discovered evidence" comes entirely from the Crestview records that were produced to him several months before the supplemental filing deadline, all of which he claimed to have reviewed at that time. Salazar contends that the documents show both that other Crestview employees misappropriated pre-need funds and that Crestview has insurance coverage for the misappropriation of those funds.

Salazar's insurance evidence consists of miscellaneous insurance declaration sheets for a variety of policies apparently issued to Crestview prior to its bankruptcy filing. Without more, this evidence fails to create an issue of fact with respect to the existence of specific coverage for pre-need fund misappropriations. Moreover, Salazar failed to take advantage of the post-judgment opportunity provided by the Insurance Order to make demand on the insurance companies for the coverage he claims exists. If Salazar himself is unwilling or unable to pursue insurance proceeds on behalf of Crestview, then his claim that the Trustee should do so also should fail.

Thus, Salazar failed in any meaningful way to show the existence of insurance coverage, and also failed to establish that Trustee's denial of the existence of such coverage was either inaccurate or actionable. Similarly, the

---

[21] *Graham v. Wyeth Labs.*, 906 F.2d 1399, 1416 (10th Cir. 1990).

stacks of pre-need payment receipts signed by Crestview employees that Salazar submitted to the bankruptcy court fall short of establishing that those employees, rather than Salazar himself, were responsible for the pre-need losses. In any event, the relevance of that particular claim to anything other than Salazar's personal vindication is speculative. Apart from any other defect in his claims, these weaknesses in Salazar's evidence render it insufficient to satisfy the "materiality" element of Rule 60(b)(2).

However, the bankruptcy court based its decision on its finding that Salazar's evidence was not "newly discovered," both because it was in his possession prior to the summary judgment, and because he previously represented to the court that he had reviewed all of the evidence prior to that time. Likewise, Salazar's failure to inform the court either that he needed more time to review Crestview documents, or that he had been denied access to them, does not satisfy the element of "due diligence" under Rule 60(b)(2).

This Court may only reverse the bankruptcy court's denial of Rule 60(b)(2) relief if it finds a complete lack of a reasonable basis for the denial and is certain that the decision is wrong.[22] In *Zurich*, as here, the proffered evidence essentially consisted of suspicion that additional evidence existed that would support a particular claim. Salazar, whether in possession of documentation or not, was at all times during the pendency of AP 1248 aware of the insurance and employee fraud claims, and also that documentation of those claims did, or could, exist. In fact, he was the president and operator of Crestview during the period that the documents were generated. Whether or not he actually laid hands on the precise documents he sought until after summary judgment had been entered, it is clear that Salazar was aware of their existence long before that time. Nonetheless, he failed to assert those claims in response to summary judgment.

---

[22] *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005).

Suspicion and fragmentary evidence offered after the fact do not amount to newly discovered evidence under Rule 60(b)(2).[23]

Finally, since Salazar's newly discovered evidence purportedly supports his underlying claims against Trustee relating to insurance coverage and employee misappropriation, it is important to note that the summary judgment that Salazar seeks to set aside in this case (AP 1248) was based solely on the doctrine of *res judicata*. Under that doctrine, issues that either "were or could have been raised" in AP 1091 may not be relitigated in AP 1248.[24] Salazar asserted the same claims of insurance coverage and employee fraud in AP 1091, they were litigated at trial, and were found to be insufficient as a matter of fact and law. Therefore, even if Salazar's evidence strongly supported his insurance and misappropriation claims, it still would not appropriately be presented in a subsequent proceeding. Even if such evidence exists and was "newly discovered" since trial, it would properly only be considered in AP 1091, a case which this Court has already affirmed. Therefore, on the record before us, we are unable to conclude that the bankruptcy court abused its discretion by denying relief based on the existence of newly discovered evidence.

C. 60(b)(3) - Fraud, misrepresentation or other misconduct by the adverse party

Salazar argues that Trustee obtained summary judgment through fraud or misconduct. He has the burden of proving this claim by clear and convincing evidence.[25] In support of his claim, Salazar argues that Trustee fraudulently denied that Crestview had insurance coverage for its pre-need losses. Salazar also

---

[23] *See id.* at 1293.

[24] *InteliQuest Media Corp. v. Miller (In re InteliQuest Media Corp.)*, 326 B.R. 825, 830 (10th Cir. BAP 2005).

[25] *Anderson v. Dept. of Health & Human Servs.*, 907 F.2d 936, 952 (10th Cir. 1990).

claims that Trustee wrongfully denied that employees other than Salazar placed pre-need money into the wrong accounts. The bankruptcy court found this evidence insufficient to prove fraud under a clear and convincing standard. We agree.

Rule 60(b)(3) claims are subject to the heightened standard applicable to fraud on the court.[26] Under that standard, Salazar must show, by clear and convincing evidence, a deliberate, planned intent to deceive or defraud the trial court.[27] Thus, Rule 60(b)(3) is aimed at judgments that were unfairly obtained, not those that are simply factually incorrect.[28] Salazar's fraud evidence is, at best, an allegation that Trustee knew of evidence, yet denied its existence. Aside from the fact that the "evidence" Salazar claims was kept from him by Trustee is far from convincing of the claims he makes, Salazar cannot, and does not, deny that he ultimately received all of the documents he sought prior to entry of judgment. In any event, evidence that may seem inconsistent does not necessarily suggest fraud, misrepresentation, or other misconduct.[29] Therefore, the bankruptcy court did not abuse its discretion in denying Salazar's Rule 60(b)(3) claim.

VI. CONCLUSION

For the reasons set forth above, we conclude that Salazar has failed to show that the denial of his motion for Rule 60(b) relief was an abuse of discretion. The bankruptcy court's May 24, 2005, "Order Denying Rule 60(b)(1)(2)(3) Motion" and its June 8, 2005, "Order Denying Motion for Reconsideration" of that order are affirmed.

---

[26] *Yapp*, 186 F.3d at 1231.

[27] *Id.*

[28] *Zurich*, 426 F.3d at 1290.

[29] *Anderson*, 907 F.2d at 952.